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JAMES R. BROWNING, Clerk

In the
Supreme Court of the United States

OCTOBER TERM, 1960

No. 274

JAMES P. MITCHELL, Secretary of Labor,
United States Department of Labor, v
PETITIONER,

WHITAKER HOUSE COOPERATIVE, INC., *et al.*,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS

1. Question Presented

Are member-patrons of a true cooperative (i.e. Whitaker House Cooperative, Inc.) employees of themselves under the Fair Labor Standards Act?

2. Statement of the Facts

The opinion of the District Court (Petitioner's Record Appendix 78-79, officially reported at 170 F. Supp. 743) contains a fair statement of the facts. (See pages 198 to 208 of the Petitioner's Transcript of Record.) However, some aspects of the operation of the Cooperative are omitted, therefore, a short statement is included here for the benefit of the Court.

In the spring of 1957 a group of about fifty women from the central portion of Maine between the ages of thirty-five and eighty-five gathered together for the purpose of organizing an association which would enable them to market the products of their hand work. These women, for the most part came from what would certainly be considered rural areas and would be classified as skilled artists in the making of crocheted and knitted outer wear primarily for infants. Many of these women in conjunction with their husbands own their own homes, made these items in their spare time, for the most part, in their own homes with materials such as wool, nylon yarn and knitting needles or crochet hooks supplied by themselves. Most of these women had been making these items for many ~~years~~ in some cases as much as fifty years.

On July 9, 1957 some thirty of them met as a group at the Jefferson Hotel in Waterville, Maine, for the purpose of organizing themselves. At this meeting they decided to organize into an incorporated cooperative which they name Whitaker House Cooperative, Inc. The purposes of the corporation which was to be established by them was

- "1. To manufacture, sell, and deal in knitted, crocheted and embroidered goods of all kinds and in general to carry on a knitted wear business of making and

selling knitted, crocheted, or embroidered clothing either at wholesale or retail.

2. To purchase, lease or otherwise acquire and to hold, use, manufacture, or otherwise dispose of any materials and products which may be involved in the carrying on of the aforementioned business.

3. To do any and all lawful acts and things necessary, pertaining, convenient, or incidental to the foregoing purposes or any part thereof tending to increase the value, usefulness, comfort, or convenience of the property or any part thereof at any time held by said corporation, and to have or exercise all the rights, powers, and privileges appertaining to corporations of a similar nature organized and existing under the laws of the State of Maine; but not, however, to have or exercise any right, power, or privilege for any purpose for which corporations are not permitted to be formed under the General Laws of the State of Maine as provided in Section 1 to 24 both inclusive, of Chapter 56 of the Revised Statutes of Maine, 1954, and acts amendatory thereof or additional thereto. (Whitaker House Cooperative, Inc. charter.)

At this meeting by-laws were read to the assembled group and passed upon after appropriate amendments or changes were made by the women and then finally adopted by those present. The women then elected a Board of Directors from among their own group and also officers. Thereafter the organization of the cooperative corporation was completed as of July 18, 1957. The directors then met and hired as general manager one Evelyn M. Whitaker, a person known to the membership and directors at that time as being one who had a great deal of experience in the merchandising of the particular type of articles which these women made and whom they felt to have all the

qualifications necessary to fulfill the position as general manager. The Board of Directors also in behalf of the cooperative agreed to purchase an inventory of articles which the same Mrs. Whitaker had in her possession.

Thereafter the Board of Directors held monthly meetings. This required a certain amount of personal expense to each of them inasmuch as they had to travel distances of thirty to seventy miles, as far away as Lincoln, Maine, to attend these meetings for which they received no compensation. At these meetings the business operations of the cooperative were reported to the Directors, financial reports were submitted and general problems of business policy resolved by the Board of Directors. Many members other than Directors frequently attended the meetings of the Directors.

Soon after the cooperative started business it became swamped with applications for membership and orders from stores all over the country. It became apparent that Mrs. Whitaker could not perform the functions satisfactorily of both general manager and treasurer. She resigned as treasurer and the Board of Directors filled this vacancy by electing the Chairman of the Board of Directors, Mrs. Ella Mae Banton, as treasurer. In the case of both persons who held this position, they were required by the Directors to be bonded in the amount of \$2,000.

About two hundred women finally joined the cooperative. One hundred sixty of which were from Maine and approximately forty were from outside the State of Maine. A person desiring to become a member of the cooperative would make inquiries of any of the officers or the Board of Directors, whereupon they would be sent a copy of the by-laws and an application blank. They were required to submit a sample of their knitting to the home office and to pay a membership fee of \$3.00. Upon receipt of the sample from a prospective member and the application blank

properly executed by the applicant, Mrs. Whitaker as general manager would either approve or disapprove the application. If the application was disapproved, the applicant had the right to appeal to the Board of Directors. All of the members have paid their respective membership fee and no knitted or crocheted products are sold for any one other than members. In other words the cooperative acts as a selling agent only for its members.

In October of 1957 a special meeting of the members, was held at the Grange Hall in Troy, Maine where the Directors, officers and about forty members were in attendance. At this meeting reports of the business operation of the cooperative were given and the financial statement read to the members.

During the succeeding months financial problems arose which required the cooperative to obtain a bank loan in the amount of \$5,000 in the spring of 1958 which was used as operating capital. The cooperative gave its note to the lending bank. This note was personally endorsed by three of the directors and the vice-president, Mr. Jack Kennedy, who receives no salary or other compensation. In June of 1958 the annual membership meeting was held at Bangor, Maine, where again a report was given to the members by the cooperative's accountant, Francis Jacobs. At this meeting the members voted to amend certain of the by-laws and also voted to require an annual membership fee of \$3.00 and that payments to the membership be made every other month. A motion made at the June meeting to establish a cash reserve for the purpose of paying off back indebtedness was tabled.

It is interesting to note that at the first meeting of the associates in Waterville, Maine, the members voted to do certain things which were contrary to the advice of counsel then present. They adopted the name Whitaker House Cooperative, Inc. for example. They also voted to change

the proposed purposes which proposal would have limited them to making babies or infant's wear to the unlimited proposal finally adopted. They also voted to establish a fifty-one per cent quorum requirement which has subsequently created no little difficulty.

The evidence reveals that the operating method of the cooperative can be briefly summarized as follows: A member makes any number of articles she desires and sends or takes them to the main office of the cooperative in Troy, Maine, whereupon a slip is made out in duplicate under the members name listing the articles submitted, the number and the amount of the advance allowance which the cooperative will pay to her whenever the items are sold by the cooperative. The articles then submitted are trimmed, tagged, boxed and shipped by employees of the cooperative who are paid a dollar an hour. Experience since the cooperative started shows that the inventory turnover takes about three months and that the members do not receive their advance allowance for several months after they are sent in to the cooperative.

The amounts which are paid to each member for goods submitted are determined by the Board of Directors after deducting the anticipated cost of overhead and sales. The directors attempt to divide the price charged to the retail stores so that twenty per cent will go to the sales force, twenty per cent for all other expenses and sixty per cent will go to the members. In actual practice the amount received by the members has equaled approximately fifty-seven per cent.

The cooperative has a sales agent who, as described above, receives a twenty per cent sales commission. The orders obtained by the sales force from the cooperative's retail customers come directly to the cooperative where the general manager prepares the order for shipment, ships them directly to the retail store and bills are sent by her

directly to the retail store which again in return pays directly to the home office of the cooperative.

Members often call the home office of the cooperative in order to find out what items have been ordered in order that they may make things which they can expect to sell promptly through the cooperative. The designs or styles of the various items are made up by various members of the cooperative.

In the operation of the cooperative, which was organized as a non-profit organization, no one receives any profits from the sale of merchandise by the cooperative. There is no return on capital investment and the only entrepreneurial profit that could be available would be the amounts which the members would receive in the event that excess receipts were distributed after the payment of sales and overhead expenses.¹

On this record, the trial court found that Whitaker House Cooperative, Inc., is a bona fide cooperative, and held that it did not "suffer or permit" its producing-members to work within the meaning of the Act. The basis of the holding is *completely* clear as the Circuit Court said in its opinion. . (275 F.2d at 363) "The parts of the record cited to us do not establish that the District court was clearly

¹ Events which have occurred since the day of the trial demonstrate even more fully the control of the cooperative by the members. They have cut costs by eliminating the salary of the president, discharging the accountant, cutting commissions to the sales force and by changing the method of packaging. They increased their income by raising the prices charged to the stores. On May 6, 1960 the home office of the cooperative was burned which resulted in a \$6,000 loss over and above the insurance carried on the inventory. This \$6,000 loss was not borne by Mrs. Whitaker, the president or the corporate entity known as the cooperative but by each individual member in proportion to her share of ownership in the entire inventory. All of this was done as a result of their own voting. These facts are recited to rebut the petitioner's claims on pages 12-13 of their brief, concerning the financial distress of the cooperative. The respondents contend this is irrelevant to the main issue.

erroneous in its finding that the cooperative was a bona fide cooperative controlled by the member producers. The record indicates that the members of the cooperative took an active part in the management of the cooperative affairs through the directors. The evidence of various changes in the line of items produced, in the prices charged, in the auditing and bookkeeping procedures, and in the manner of payment in order to adapt to the problem of inventory accumulation, as well as the evidence of a restricted role for Mrs. Whitaker all demonstrate the correctness of the district court's finding of a bona fide cooperative with control by the member-producers."

3. Statement of the Law

"Americans have open to them under the Constitution another form of social and economic control—one more in keeping with our traditions and aspirations. They may prefer the way of cooperation, which leads directly to the freedom and the equality of opportunity which the Fourteenth Amendment aims to secure. That way is clearly open. For the fundamental difference between capitalistic enterprise and the cooperative—between economic absolutism and industrial democracy—is one which has been commonly accepted by legislatures and the courts." *Liggett Co. v. Lee*, 288 U.S. 517, Page 579, Brandeis, J.

"The aim of cooperatives is economic democracy on lines of liberty, equality and fraternity." *Frost v. Corporation Commission*, 278 U.S. 515, Page 536, Brandeis, J.

"Cooperation is a basic tenet of a civilized society. The combination of individual activity which is envisioned in cooperation can assume many forms and can have many purposes. The broad scope of the word "cooperation" is equally applicable to the word "cooperative" used as an adjective. The word "cooperative" used as a noun, how-

ever, has come to have the more limited meaning of a certain type of association.

"A cooperative is an association which furnishes an economic service without entrepreneur profit and which is owned and controlled on a substantially equal basis by those for whom the association is rendering service. The definition is of value as a matter of clarification but should not be used for substantive exclusion or for the limitation of analysis. Brandeis, J., long ago, pointed out that "no one plan of organization is to be labelled as truly cooperative to the exclusion of others."

"Preliminary comment should be made about the expression "entrepreneur profit" which really represents the antithesis of the benefits normally ascribable to cooperatives. "Entrepreneur profit" is used in the true economic sense of a return for the speculative or risk element in an enterprise. In a cooperative, all the members assume, in a broad sense, the economic risk, and they contemplate no return for the undertaking of the risk. In cooperatives there may be a return for the use of capital investment and even for the risk of loss, but there is no contemplation of an additional return on capital based upon the potentialities or the actualities of successful operation." *Law of Cooperatives*, 3rd Ed., Israel Packel, pages 1-3.

"Normally, a cooperative has the following attributes:

1. control and ownership of each member is substantially equal;
2. members are limited to those who will avail themselves of the services furnished by the association;
3. transfer of ownership interests is prohibited or limited;
4. capital investment receives either no return or a limited return;

3. economic benefits pass to the members on a substantially equal basis or on the basis of their patronage of the association;
6. members are not personally liable for obligations of the association in the absence of a direct undertaking or authorization by them;
7. death, bankruptcy, or withdrawal of one or more members, does not terminate the association; and
8. services of the association are furnished primarily for the use of the members." *Law of Cooperatives*, supra, pages 3-4.

"The primary objective of an ordinary cooperative is not charitable. In the normal case, the cooperative is designed to further the economic interests or welfare of its members. Economic welfare does not merely refer to financial savings or increased monetary returns. It cuts much deeper and takes into consideration basic aspects of economic life. Quality of product, decency of service, ownership, control and satisfaction of self-help are important benefits of cooperatives and sometimes are even more important than the direct financial benefits." *Law of Cooperatives*, supra, pages 6-7.

"The factor of individual ownership, which is an important aspect of cooperatives, is a distinguishable feature between communistic societies and cooperatives.

"This factor of individual ownership is the obvious reason why cooperatives and state communism are as far apart as any system of private capital and communism. The communistic concept of public ownership, bereft of religion and begat by revolution, makes the state supreme and the individual merely a tool of the state. In striking contrast is the democracy of control and ownership of a cooperative. That factor, combined with the concept of the member as an individual with basic rights, might well be

the vehicle for extended economic benefit in marginal areas of the world by way of self-help, rather than by way of public fiat." *Law of Cooperatives*, supra, page 8.

"The most stirring story of the cooperative movement is that of the Equitable Pioneers' Society organized in 1844 by a small group of laborers in Rochdale, Lancashire, England. That group is usually spoken of as the first consumer cooperative. The real emergence in this country of a settled policy, however, with regard to the cooperative movement came in 1875 when the so-called Rochdale principles were adopted at the convention of the National Grange of the Patrons of Husbandry. Notwithstanding the lapse of over one hundred years, the principles adopted by the small Rochdale group are still referred to in stating fundamental principles of cooperatives. Any discussion of cooperatives would be incomplete if it failed to refer to the following rules or practices adopted by those early economic pioneers in furnishing themselves with necessities of life: (1) charging of local prevailing prices; (2) limited interest on capital investment; (3) refunds in proportion to purchasers; (4) sale for cash and not for credit; (5) sex equality; (6) one vote for each member; and (7) regular and frequent meetings."

"The historic significance of the Rochdale cooperative has had its greatest impact in its emphasis upon the democratic nature of the enterprise. That aspect has been the intangible rallying call which has enabled many cooperatives to weather storms which could not have been safely met if there were reliance merely on the anticipated savings of the cooperative." *Law of Cooperatives*, supra, pages 12-13.

"The marketing cooperative must be considered in a broader aspect than marketing by only farmers. It refers to any cooperative which is utilized in order to help cooperative marketing by persons who produce economic

goods." *Law of Cooperatives*, supra, page 18, Italics supplied.

"Most cooperatives, other than the labor unions, have preferred to become incorporated. The lines of authority and the internal rights of the members, as well as the relations of the cooperative to third persons becomes much clearer and more certain with incorporation. Incorporation tends to produce more orderly administration of the affairs of the cooperative." *Law of Cooperatives*, supra, pages 34-35.

"Cooperation is a method of doing business. A cooperative association is a business organization, usually incorporated, owned and controlled by member producer, which operates for the mutual benefit of its members or stockholders, as producers or patrons, on a cost basis after allowing for the expenses of operation and maintenance and any other authorized deductions for expansion and necessary reserves. This definition is intended only as an approximation. It should be kept in mind that a cooperative association is a capitalistic institution. In fact a cooperative marketing or purchasing association is a capitalistic business organization for the financial advantage of its member-patrons. Few, if any, associations would be formed if it were not believed that they would operate to the financial advantage of their members. Associations are formed for the same reasons as other business enterprises. In a cooperative, however, the financial benefits accrue to the patrons, while in a commercial enterprise they accrue to those who have invested their money in the business." *Legal Phases of Cooperative Associations*, L. S. Hulbert, Farm Credit Administration, page 1.

"The cooperative character of an association does not depend on whether it is formed with or without capital stock. Either type of association may be thoroughly co-

operative if properly organized and operated." Ibid, page 2.

"It should not be assumed that the members or stockholders of a cooperative association, except in a technical legal sense, are separate and apart from the association. The members are the association, and the officers and directors of the association are simply their agents for the conduct of the joint enterprise. The officers and directors of an association are placed in office and continue there only through the action or acquiescence of the stockholders or members. In other words, the stockholders or members are the principal or the "employer" and the officers and directors are simply their "employees" or agents to direct the business; and agents are subject to the control of their employers.

"Frequently, if not generally, cooperative associations on receiving the products of a member make an advance to him which constitutes a "part payment" or more accurately partial returns; final returns are made after the sale of the products or at the end of the pooling or marketing period.

"Pooling is a practice common to cooperative associations. It is an averaging proposition. For instance, the expenses incident to the operation of an association are pooled and are then divided among the members on an equitable basis. Many cooperative marketing associations pool the products received from their members; that is, they mingle those products which are of the same grade and quality so that the identity of any particular lot is lost. On the sale of the products in a particular pool, the association renders a final account to each member, based upon the quantity he contributed to the pool. Some associations pool returns without pooling products; that is, the returns from the products of the same grade and quality which are sold during a given period, usually at varying prices, are

combined and are then divided among the members on a unit basis." Ibid, pages 5-6.

"Cooperative associations frequently make advances or partial "payments" to their members on receipt of their products. The question arises, in the event the advances or payments made exceed the amount to which the member is entitled, after deducting marketing expenses and all other authorized deductions from the sales returns, may the association recover the amount of such excess advances or payments from the member? The answer is "Yes." The basis for the recovery is the doctrine that no man shall be allowed to enrich himself unjustly at the expense of another or shall be allowed to retain money that in "equity and good conscience" belongs to another." Ibid, page 145.

"It has been held that where an association operated on a cash basis if the members had been overpaid for their products they became indebted to the association for the amount of the losses suffered by the association because of such overpayment, unless the loss was due to some negligence, fault, or misconduct of the association itself in the marketing of these products." *Legal Phases of Cooperative Associations*, by L. S. Hulbert, Farm Credit Administration, May 1942, page 147.

"Cooperation is an economic system with a social content. Its idealism penetrates both its economic and its social elements. The economic ideals affect the business enterprise, its methods and operations. The social ideals have a direct bearing on the association of persons comprising the society, particularly as they affect the membership and personnel relations." *The Cooperative Movement and Some of Its Problems*, Paul Hubert Casselman, 1951, page 1.

"The Rochdale Pioneers were inspired by the democratic spirit. Their democratic idealism incited them to

decentralize and to humanize control of business to the fullest extent possible, and still retain economic efficiency. In fact, it is difficult to find a more democratic method of business control which remains commercially sound. This democratic idealism explains the reasons for the following cooperative practices:

- (a) The limit of one vote per member irrespective of the number of shares held.
- (b) The elimination of voting by proxy.
- (c) The requirement of regular reports from the executives.
- (d) Constant education to keep the members informed.
- (e) The accessibility of the cooperative's books for inspection by the members.

Ibid, page 2.

"Cooperation brings to those small homecrafts the advantages of large-scale business by pooling both produce and purchases. In this way, the members of a cooperative can sell their products at retail prices."

"Cooperation permits these homecrafts to perform certain marketing functions which would be impossible to the individual operator. They are, for example, storage, transportation, financing, grading and packaging."

"Lastly but not least, the practice of cooperation has a moral effect on the people and makes them better citizens. They become more enlightened electors, more honest business men, and more social and charitable in general demeanor." Ibid, page 156.

4. Argument

The question whether an injunction can issue against the cooperative as an employer involves not questions on ad-

mitted facts, but the fundamental question of law, i.e. whether if persons choose to associate themselves cooperatively in the legitimate business of marketing the product of their handicraft, they can be restrained from doing so by the device of designating them their own employees.

It has been stated in the *Wagner* (*McComb v. Wagner*, 89 F. Supp. 304) and *Nutter* (*Mitchell v. Nutter*, 161 F. Supp. 799, (D.C. Me. 1958)) cases that six criteria, for determining whether or not an employment relationship exists, may be drawn from the leading Supreme Court decisions on employment relationships under this Act and the related Social Security and National Labor Relations Acts. These suggested criteria are: (1) the extent to which the services in question are an integral part of the "employer's" business; (2) the amount of the "employee's" investment in facilities and equipment; (3) the nature and degree of control retained or exercised by the "employer"; (4) the "employee's" opportunities for profit or loss (5) the amount of initiative, skill, judgment or foresight required for the success of the claimed independent enterprise; and (6) the permanency and duration of the relationship. When applied to the respondent cooperative it can be seen that the members in the conduct of their own individual businesses or craft receive a very valuable service from the cooperative and that as a matter of close analysis members do not render any service to the cooperative thus the first criteria listed above is inapplicable. It might be well to ask the question in respect to the first criteria: Who is the employer in this situation? Second, it will be observed that the members proportionately have a very high investment in materials, they being tenants in common of the fungible mass known as the cooperative inventory in addition to the materials they personally may have on hand. Compare this with the slight investment of the cooperative in shipping materials which of course is

actually the joint property of the members. Third, all of the authority for control of the entire operation is in the hands of the members who, through their by-laws, have delegated certain administrative functions to the Board of Directors and the officers. However, we should not lose sight of the fact that the members have the authority and have exercised it when the occasion arose, such as at the three meetings of the members. Fourth, the cooperative as a separate corporate entity has no opportunity for profit or loss nor do the officers. After payment of overhead and selling costs all proceeds go directly to the members. If the cooperative is unable to sell the articles submitted for sale then the member, not the cooperative or the officers, stand to lose whatever materials and time that she has invested in these items. Fifth, the duration of the relationship which each member has with the cooperative depends upon the individual desires of the particular member.

The service rendered to the members by their group unit, or the Cooperative, is that of an agent for the marketing of their hand made goods. It is to be noted that the members do not transfer title to the Cooperative when they send in their items to be sold and the Cooperative is not liable to the members for any set purchase price. The Cooperative acting as an agent of the members sells the goods, pays the overhead and remits the balance to the members on a pro-rata basis.

Let us look at a couple of hypothetical situations. There are a number of individual boat builders in Maine, highly skilled in their craft who make a wide variety of boats in about every price range. Let us assume that some of them realize that as individuals they are unable to compete with large mail order and wholesale concerns in the better market areas because as individuals they cannot afford to hire sales representatives nor can they as individuals meet the volume requirements of modern metropolitan mer-

chandising methods. These craftsmen then decide to establish a cooperative of boat builders which will provide them with a centralized office and display room and will provide a sales force for them. The individual boat builders send their boats into the display room to be sold. The cooperative itself does not buy the boat. Query? Are these boat builders employees of their own cooperative? Even the petitioner should agree there is no employment relationship here. The petitioner would argue, of course, that the large investment of each builder in his tools and equipment together with other differences would enable them to avoid application of the Act.

Let us, then, take another example. Forget for the moment that those engaged in farming are exempt from the Act. Let us assume that a group of one hundred small potato share-cropping farmers become concerned about losing the middleman's profit on the sale of their potatoes. They organize a potato marketing cooperative. Let us also assume that they do not own the land on which their crops grow and they rent the equipment used to grow their crops. They elect four from among themselves to supervise the grading, packaging, storage and sale of potatoes and these four hire a professional potato wholesale manager. Can it be said that these farmers in growing their own potatoes are employees of their own marketing cooperative?

The immediate reaction is, of course, they are not employees. This hypothetical situation is a far cry from the organization established in *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755 (1949) where the farmers hired others to do the work for which their cooperative had been established. The warehouse workers and manager of our hypothetical case would be the type to be covered under the Farmers Reservoir decision.

5. Legislative History Not Significant

The respondents agree that the legislative history reveals many unsuccessful attempts to exempt homeworkers from the provisions of the Act. Respondents have not, do not and will not advocate exempting homeworkers from the provisions of the Act. However, the Act only applies to homeworkers who are in fact employees. The members of Whitaker House Cooperative say that they are not employees and do not need or want the protection of the Act. As the District Court said (R. 215) . . . "it is difficult to see how the homeworkers here involved require the protection of the Act, or that the Act should be applied to them. The evidence discloses a marketing cooperative organized and operated by these ladies for the purpose of permitting them to sell to better advantage the products of their handicraft. In essence, the Cooperative exists to render services to its members; it receives the products produced by its members, sells the products for its members and distributes the net proceeds to its members as the articles submitted by them are sold. The record shows that the members are engaged, through the Cooperative, in a joint venture for the production and sale of hand-knit infants' outerwear, and that they are so engaged for their own mutual benefit, and not as employees and employed by anyone. Their interests, as members and producers are identical. The work they perform is performed by them as members of the Cooperative, and not as its employees. Cf. *Halling v. Plymouth Mfg. Corp.*, 139 F.2d 178 (7th Cir. 1943, cert. denied, 322 U.S. 741 (1944))."

The petitioners repeatedly make reference to the congressional record involving the original consideration of the Act and proposed amendments thereto. An examination of these references discloses merely discussions of exemptions of admitted employees of agricultural coopera-

tives. No mention is made in these records as to whether or not member-owner-producers are at the same time employees of their own cooperative. The respondents agree that the congressional intent as expressed in the Fair Labor Standards Act was to include all employees unless specifically excluded. However, there is nothing in the congressional record which would indicate that member owners of a cooperative are employees.

"The "economic reality" of the instant situation compels the conclusion that while these ladies work to produce their products, they do not work for the Cooperative, and neither does the Cooperative "suffer or permit" them to work. It has no connection with their labors. Rather, they, collectively, "suffer or permit" themselves individually to work. If the Fair Labor Standards Act be strained to recognize an employment relationship in these circumstances, such relationship can only be between these women as members and the same women as homeworkers. The Congress may wish in its legislative wisdom to declare that they so employ themselves. But in the opinion of this Court, the Act as written does not now so provide. This Court will not judicially legislate, whether it be urged to do so by homeworkers as in *Mitchell v. Nutter*, *supra*, or as here by the Department of Labor." *Mitchell v. Whitaker House Cooperative, Inc.*, 170 F. Supp. 743.

6. The Supreme Court Has Previously Rendered a Decision Involving The Present Issue in Favor of the Respondents.

This court denied the petition for writ of certiorari of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor against Plymouth Manufacturing Corporation *Walling v. Plymouth Manufacturing Corporation*, 139 F.2d 178 (7th Cir. 1943)

cert, denied 322 U.S. 741 (1944)), and therefore has already considered the situation where, if work done by a partner of a partnership is rendered as a partner for the partnership and not as an employee of the partnership then the Act does not apply. A cooperative is often defined as an incorporated variation of a partnership. Even though the court in the *Walling v. Plymouth* case did not rule upon the exact issue as to whether partners are employees of a partnership, it is significant that no later cases are reported involving this same partnership or any other partnership on this issue. It is perhaps even more significant that there does not seem to have been any great flood of partnerships in a wave of attempts by businesses to avoid the application of the Act in the wake of this case.

There is no likelihood that the country will be flooded with bona fide cooperatives to avoid the provisions of the Fair Labor Standards Act. Why, because it involves too much work with no entrepreneur profit. A businessman who might attempt it would soon find that he could not make a profit himself if he organizes a bona fide cooperative. If it is a "front" type cooperative then the Act would apply as it has for the last twenty-two years. The fact that the Act has been in effect this long without any true cooperatives being organized to avoid its application speaks louder than any argument the petitioner can put forth that the cooperative affords an easy means of vitiating the effect of the Act.²

7. Decisions Below Have Not Altered Established Law

The decision of the court below has in no way altered or changed the authority of prior rulings of this court or any other court as far as the meaning or the scope of the

² See 74 Harvard Law Review, No. 4, Recent Cases, P. 791 at 793.

Fair Labor Standards Act in its coverage of homeworkers is concerned. Indeed, the District Court below had shortly before the hearing in the instant case rendered a decision which followed all of the previous rulings involving homeworkers. (*Mitchell v. Nutter*, 161 F. Supp. 709, D. Maine.) This decision reviewed completely the long line of decisions involving the Act's coverage of homeworkers. It would be inconceivable that the court below should render a decision shortly afterwards which would change any of the effect of the prior ruling.

The court below examined the congressional history³ of the Act and found it "unenlightening." Specific Congressional reference to cooperatives, in context, are directed solely to the applicability of the Act to persons who are "employees" of a cooperative in the sense concluded by *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755 (170 F. Supp. 743);" (R. 212)

It is significant that the Court of Appeals involved here is the same court which rendered the opinion upon which the petitioner has so heavily relied throughout these entire proceedings, namely, *Fleming v. Palmer*, 123 F.2d, 749 (1st Cir. 1941), cert. denied, sub nom., *Caribbean Embroidery Cooperative, Inc. v. Fleming*, 316 U.S. 662 (1942).

The Court of Appeals below distinguished its previous decision in *Palmer* on the grounds that the former decision did not involve "... a bona-fide cooperative, so that in economic reality the members of the cooperative were in an employee relation to Palmer, and the cooperative amounted to no more than a manner of paying the workers." *Mitchell v. Whitaker House Coop. Inc.*, 275 F.2d at 363.

The Court of Appeals also distinguished *McComb v. Homeworkers' Handicraft Cooperative*, 176 F.2d 633. (4

³ The District Court had the attorneys for the petitioner obtain copies of all Congressional Committee hearings for the Court to examine before rendering its opinion.

(Cir.), cert. denied 338 U.S. 900 (1949), and stated that "the cooperative was found to be merely a conduit for paying the homeworkers who in reality were employees of the bag companies, and it was held that since an employer-employee relationship existed the Act applied. Here the record revealed that the member-producers were engaged in this enterprise on their own account." *Mitchell v. Whitaker Coop. Inc.*,⁴ supra. *McComb v. Homeworkers' Handicraft Corp.* was another case upon which the petitioner heavily relied in the courts below. The petitioner gains nothing by alleging that the court below did not consider these decisions, for it is quite apparent from the reading of both opinions below that the courts were very concerned about the importance of this litigation and were extremely careful in their appraisal of the situation presented to them by this case.

8. Whitaker House Cooperative, Inc. Is A True Cooperative

Major differences between Members' Business and Evelyn Whitaker.

The Petitioner attempted without success, at the trial to show that the business of the Cooperative and Evelyn Whitaker were identical and that the latter had the same interests in both operations. That there are some similarities, must be admitted. The same type of merchandise is handled by the Cooperative and the items are still sent to Mrs. Whitaker's home for trimming, tagging, boxing, and shipping. The similarities end right there. They are hardly worth mentioning when compared to long lists of changes that have occurred. The following is a table which demonstrates the differences.⁴

⁴ See testimony of Evelyn Whitaker, (R. 68-124), Audrey Leavitt, (R. 124-127) and Ella Mae Banton, (R. 135-142).

MRS. EVELYN WHITAKER

1. Inventory owned by her.
2. Profits retained by her.
3. Sales personally performed by her.
4. Purchase and sales contract between homeworkers and herself.
5. Risk of loss entirely hers.
6. Prices to homeworkers set by her, lower than Cooperative.
7. Retail prices set by her, lower than Cooperative's.
8. Payments to homeworkers made promptly after she received goods.
9. Success of business rested on her initiative and judgment.
10. Accounting and bookkeeping performed by herself.
11. Records not available to homeworkers.
12. No reports given to homeworkers.
13. Self-employed.
14. Activities self directed.
15. Borrowed money in own name.
16. Income dependent on profits.
17. Personal checking account.

WHITAKER HOUSE COOPERATIVE, INC.

1. Inventory, a fungible mass owned by all the members.
2. Non-profit, all proceeds after costs go to members.
3. Sales, handled by sales force hired by directors.
4. No purchase and sale agreement between cooperative and the members. The cooperative acts as a selling agent for the members.
5. Risk of loss entirely with the members.
6. Advance allowances set by Directors, members receive more than they did from Mrs. Whitaker.
7. Retail prices set by Directors.
8. Time and amount of payments determined by directors after goods are sold.
9. Success of business rests upon the Cooperation of all members.
10. Accounting and bookkeeping performed by independent accountant.
11. Records available to all members.
12. Reports given to all members and directors.
13. Mrs. Whitaker serves as general manager subject to the power of the Board of Directors to fire her.
14. Directors give General Manager orders and instructions.
15. Money borrowed in name of Cooperative.
16. General Manager's salary set by Directors.
17. Checking account in name of Cooperative, checks issued by treasurer who is a member.

16. Area of business limited to New England.
17. Trimmer's were her own personal employee's.
18. The members now have a nation-wide business.
19. Trimmer's employees of Cooperative, paid by Cooperative.
20. No other expenses.
21. Cooperative has expense of President's and Treasurer's salaries, printing, accounting, and sales force.

9. The Palmer Case Distinguished

The First Circuit Court in *Fleming v. Palmer et al.*, 123 F.2d 749 found many facts to indicate that the pseudo-cooperative which had been set up in that case was certainly not an example of an industrial democracy.

Listed below are several points of difference which clearly show that Whitaker House Cooperative is a "true cooperative" owned and controlled by its members.

*PALMER CASE

1. Eight incorporators, one for each process of the business representing management. Homeworkers had no representative.
2. Palmer guaranteed payment of various accounts for the Cooperative.
3. Incorporators made no changes in by-laws.
4. "Bases of Contract" with Palmer bound the pseudo cooperative to Palmer so tightly that cooperative had no control of financial affairs.
5. By-laws are so phrased as to enable the Palmer interests to retain the same control that they had always enjoyed.
6. Palmer received ten per cent of the gross income.

WHITAKER HOUSE COOPERATIVE, INC.

1. Thirty-four of the thirty-six incorporators were highly skilled homeworkers who became members.
2. Whitaker House Cooperative has done business strictly on its own account.
3. Incorporators made several changes in by-laws.
4. Financial affairs of the cooperative are in the control of the member-directors.
5. By-laws place control of Cooperative in the hands of the members and or their duly elected representatives.
6. Evelyn Whitaker is paid a flat salary.

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| <ul style="list-style-type: none"> 7. No homeworkers admitted until a year after cooperative formed. 8. Very few membership shares fully paid. 9. Only small per cent of membership entitled to vote. 10. Palmer stated cooperative would be dissolved when it became no longer necessary and that cooperative had to deal exclusively with him. 11. Palmer and his lawyer suggested the formation of the "Cooperative." 12. No meeting's of members to decide anything. 13. Actions of executive Board subject to approval of Palmer. 14. No evidence that members ever attempted to assert any control. | <ul style="list-style-type: none"> 7. Membership consisted of homeworkers from the beginning. 8. All membership's dues fully paid. 9. Every member entitled to vote. 10. No exclusive arrangement with Mrs. Whitaker. 11. Cooperative idea suggested by a representative of the Department of Labor. 12. Monthly meetings of member-directors attended by several members plus one special meeting of members and one annual meeting. 13. Actions of General Manager subject to control of Directors. 14. Record discloses an over-all pattern of active participation by members in establishing operating procedures in the collective effort to market their handwork.⁵ |
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10. Original View of U. S. Department of Labor

The U. S. Department of Labor Wage and Hour Division issued a press release to the morning papers Wednesday, January 11, 1939, R. 158 which set forth an interpretation of the Fair Labor Standards Act in relation to its applicability to cooperatives. In this release it was conceded that "—it is possible that there may be workers' cooperatives in which the interests of the members as workers are

⁵ Change in purposes in charter, changes in By-laws, designating time to pay themselves every two months as at June 1958 meeting, attendance at meetings, request made to officers, all are examples of their active participation.

in all respects the same as their interests as proprietors and in which the usual characteristic of employer-employee relationship do not exist, and hence in which the worker-members would not be employees within the meaning of the Act—." (Respondent's appendix page 33)

11. Conclusion

The way of industrial democracy, i.e. through cooperative organization, must not be closed by the indirect device of designating member-owners of a true cooperative employees of themselves under the Fair Labor Standards Act.

The decision and judgment below should be affirmed.

Respectfully submitted,

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Appendix

For release morning papers
Wednesday, January 11, 1939

R-158

**12. U. S. Department of Labor
Wage and Hour Division
Washington**

**POSITION OF COOPERATIVE UNDER
THE WAGE AND HOUR ACT**

The Fair Labor Standards Act provides no express exemption for cooperatives as such, Administrator Elmer F. Andrews of the Wage and Hour Division, U. S. Department of Labor, pointed out today. Many requests have been received by the Wage and Hour Administrator for information regarding the status of employees of cooperatives, many of whom own stock in the enterprise by which they are employed. Mr. Andrews in his statement discussed the relationship existing between these employees and the organization which employs them, of which they may be part owners.

The Administrator's statement follows:

"The question has been asked whether cooperatives are employers and members who work for them employees within the terms of the Fair Labor Standards Act. The term cooperative is used to describe various types of business organizations differing in form and method of operation. Accordingly, no statement can be made to cover all types of organizations calling themselves cooperatives. However, it may be said generally that no justification can be found for concluding that member-workers of cooperatives, otherwise covered, are not entitled to the benefits of the Act.

Any doubt which exists must be based on the notion that cooperatives are, in effect, partnerships and that no employer-employee relationship exists between them and the members who work for them. Although it is possible that there may be 'workers' cooperatives in which the interests of the members as workers, are in all respects the same as their interests as proprietors and in which the usual characteristics of the employer-employee relationship do not exist, and hence in which the worker-members would not be employees within the meaning of the Act, it is to be noted that cooperatives are commonly separate entities in which the usual characteristics of the employer-employee relationship exist as between them and worker-members. Cooperatives are generally in the corporate form with interests distinct from those of their members. Though their workers may be stockholders, as workers they are subject to the usual control and discipline of the corporate employer; they work at the discretion of the cooperative's board of directors or other managerial body. Their concern, as workers, with wages, hours of work and other working conditions, is quite distinct from and may be much greater than their interest, as stockholders, in profits or dividends.

The Fair Labor Standards Act provides no express exemption in favor of cooperatives as do some other statutes and the provisions in the Act defining the employer-employee relationship cover the relation of the ordinary cooperative to its workers regardless of whether or not they are stockholders or members.